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In The

Supreme Court of the United States

HYUNDAI MERCHANT MARINE COMPANY, LTD., and BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE*, THE INTERNATIONAL GROUP OF P & I CLUBS, IN SUPPORT OF PETITIONERS

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1824

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICUS 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

1. BY EMPLOYING THE ARBITRARY AND CAPRICIOUS STANDARD AT THE FIRST INSTANCE OF REVIEW WITHOUT CONCERN FOR REASONABLENESS, PRUDENCE, NECESSITY OR ANY SIMILAR FACTOR, THE NINTH CIRCUIT HAS ENCOURAGED OTHER COURTS TO ALLOW UNRESTRICTED SPENDING BY THE UNITED STATES GOVERNMENT 6

2. THE BLANK CHECK PROVIDED TO THE COAST GUARD BY THE NINTH CIRCUIT MAKES POSSIBLE SUBSTANTIAL, IDENTIFIABLE ABUSES PERTAINING TO (A) EXCESSIVE AND UNNECESSARY MONITORING COSTS; (B) IMPROPER, INEFFICIENT AND POLITICALLY MOTIVATED DECISIONS; AND (C) CONTINUALLY UNSPECIFIED BUT MOUNTING BASE COSTS 9

   A. THE OPINION APPROVES THE RECOVERY OF UNCHECKED GOVERNMENTAL MONITORING COSTS, THEREBY SUBSTANTIALLY AND UNNECESSARILY INCREASING THE COST OF CLEANUP... 9

   B. THE NINTH CIRCUIT HAS ENCOURAGED THE GOVERNMENT'S EXPENDITURE OF IMPROPER, INEFFICIENT AND EVEN POLITICALLY MOTIVATED COSTS WHICH DRASTICALLY INCREASE THE COST OF CLEANUP 11

TABLE OF CONTENTS – Continued

Page

C. THE NINTH CIRCUIT HAS DIRECTED THE RECOVERY OF UNSPECIFIED AND MOUNTING BASE COSTS WHICH BEAR NO DIRECT RELATION TO THE ACTUAL COST OF CLEANUP 13

3. AS A RESULT, THE NINTH CIRCUIT HAS ARBITRARILY AND SUBSTANTIALLY INCREASED THE COST OF CLEANUP, THEREBY REQUIRING UNWARRANTED SUBSIDIZATION OF THE UNITED STATES GOVERNMENT 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Conoco, Inc. v. United States, 1994 WL 24249, 2 (E.D. La. 1994) 7

Matter of Bell Petroleum Services, Inc., 3 F.3d 889 (5th Cir. 1993) 8

United States v. Attati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990) 7

United States v. Murphy Exploration and Production Co., 939 F.Supp. 489 (E.D. La. 1996) 7, 8

STATUTES

5 U.S.C. § 107 7

5 U.S.C. § 706 7

5 U.S.C. § 706(2)(A) 7

33 U.S.C. § 2701, et seq. 2

42 U.S.C. § 9607 8

MISCELLANEOUS

Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 76 [2d ed. 1975] 1

Leslie J. Buglass, *Marine Insurance and General Average in the United States* 386-418 [3d ed. 1991] 1

"Oil Spill Intelligence Report," White Paper Series, Vol. 2, No. 2, March 1998 2

INTERESTS OF AMICUS

Amicus,[1] The International Group of P & I Clubs (the "Group"), represents 19 mutual insurance associations known as "P & I clubs."[2] P & I clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." Grant Gilmore & Charles L. Black, Jr. *The Law of Admiralty* 76 [2d ed. 1975]; see also Leslie J. Buglass, *Marine Insurance and General*

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[1] Both Petitioner and the Solicitor General have consented to the filing of this brief. Copies of the letters of consent are being concurrently filed. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation of this brief.

[2] The Group's nineteen members include: (1) American Steamship Owners Mutual P & I Association Inc.; (2) The Britannia Steam Ship Insurance Association Limited; (3) Assuranceforeningen Gard; (4) The Japan Ship Owners Mutual P & I Association; (5) Liverpool & London Steamship P & I Association Limited; (6) The London Steam-Ship Owners Mutual Insurance Association Limited; (7) The North of England P & I Association Limited; (8) The Shipowners Mutual P & I Association Limited (Luxembourg); (9) Assuranceforeningen Skuld; (10) Skuld Mutual Protection and Indemnity Association (Bermuda) Limited; (11) The Standard Steamship Owners P & I Association Limited; (12) The Standard Steamship Owners P & I Association (Bermuda) Limited; (13) The Standard Steamship Owners P & I Association (Europe) Limited; (14) The Steamship Mutual Underwriting Association Limited; (15) The Steamship Mutual Underwriting Association (Europe) Limited; (16) The Steamship Mutual Underwriting Association (Bermuda) Limited; (17) Sveriges Angfartygs Assurans Forening; (18) The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited; (19) The West of England Ship Owners Mutual Insurance Association (Luxembourg).

Average in the United States 386-418 [3d ed. 1991]. The members of the Group are owners and operators from practically all maritime nations, insuring in the aggregate tens of thousand of vessels totaling in excess of 400 million gross tons or more than 90% of the world's blue water tonnage.

Oil spill response and related claims under the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. ("OPA 90") and related state legislation represent a significant risk for which the Group insures its members. The Oil Spill Intelligence Report lists 826 oil spills of over 10,000 gallons (34 Tonnes) from 1962-1997 in United States marine waters alone.[3] Of these spills, 506 or 61.3% involved vessels and accounted for more than 82% of the total amount of oil spilled.

From 1987 through July 20, 1999, $1,554,775,431.00 in larger pollution claims were passed on to the Group, of which $758,368,234.00 were on the pool and $796,407,198.00 were on the Group reinsurance. These pollution related claims represented 38.06% of pool claims and 76.71% of Group reinsurance claims. Clearly, the Group and its shipowner members have a direct and

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[3] "Oil Spill Intelligence Report," White Paper Series, Vol. 2, No. 2, March 1998. These figures necessarily underrepresent the risk of exposure to the Group, as is highlighted by the facts of this Petition. The spill arising from the grounding of the *Hyundai No. 12* involved substantially less than the threshold 10,000 gallon reporting figure adopted by the Report, and still resulted in actual cleanup costs of $4.5 million, plus the judgment on behalf of the United States totaling $1,702,553.51 (later amended to exclude penalties under the Debt Collection Act.)

substantial interest in the manner in which OPA 90 is interpreted, as does the public, which will ultimately pay for the unfettered, unjustified government costs.

STATEMENT OF THE CASE

The Petition for Writ of Mandate (the "Petition") filed by Hyundai Merchant Marine Company, Ltd. ("Hyundai") and Britannia Steam Ship Insurance Association Limited ("Britannia")[4] concerns the Ninth Circuit Court of Appeals' interpretation of OPA 90 as applied not to the actual cost of oil spill cleanup, but instead to attendant monitoring and base costs incurred by the United States Coast Guard ("Coast Guard") and other governmental agencies. It arises out of the grounding of the M/V *Hyundai No. 12* on October 2, 1991 in an environmentally sensitive area. The *Hyundai No. 12* was owned and insured by Hyundai and Britannia, respectively.

The Petition does not address Hyundai's responsibilities of actual cleanup as responsible party, as those duties were fully discharged. As the Ninth Circuit noted, "Hyundai, however, performed the actual work of containing the spill and freeing the ship, at great expense to itself." (App. 3.) The district court concurred, somewhat more expressively, emphasizing that "The court finds that the vessel owner, her insurers, and their contractors responded with reasonable promptness, diligence, and competency in carrying out their responsibilities under

[4] Hyundai and Britannia will be referred to collectively as "Petitioners."

OPA 90 in light of the difficult circumstances and remote location of the grounding of the M/V *Hyundai No. 12.*" (App. 52.)

Nor does the Petition involve a major oil spill or resulting ecological disaster. Although the record is imprecise with regard to the actual amount of oil spilled, the district court found only that " . . . from time to time, small leaks of oil and sheen were observed." (App. 47.) The Ninth Circuit asserted that "fortunately, only minor spillage occurred before Hyundai was able to free the ship and tow it to repair docks." (App. 3.) The Petition confirms that "only a small amount of the approximately 200,000 gallons of fuel oil leaked during the incident." (Pet. 3.)

The Petition, therefore, focuses not upon the $4.5 million pollution response effort undertaken by Hyundai under OPA 90, but rather upon the $1,322,149.00 awarded to the United States as monitoring costs, including base or overhead costs. While the district court understood that reasonableness, prudence and necessity were crucial to any review, particularly in light of the fact that the district court was the first and only instance of factual review, the Ninth Circuit refused to limit the application of the arbitrary and capricious standard in any meaningful way. Instead, in response to Hyundai's claim that the judgment included substantial unnecessary and unreasonable expense, the Ninth Circuit advised that " . . . OPA does not restrict the recovery of the United States to costs that were prudent, necessary, or reasonable." (App. 9.)

The Ninth Circuit's opinion will have a vast and dramatic effect on future cases within the Ninth Circuit,

as well as other jurisdictions which follow its lead. Given the Group's role as the insurer of 90% of the world's merchant ocean-going tonnage, it respectfully requests that this Court grant the Petition and establish procedural and substantive limits on the monitoring costs, including base costs, which the United States government and other entities will be allowed to recover in future spills.

SUMMARY OF ARGUMENT

The Ninth Circuit's application of the arbitrary and capricious standard at the first instance of review, without concern for reasonableness, prudence, necessity or any similar factor encourages courts to allow unrestricted, wasteful spending by the Coast Guard in monitoring an oil pollution response. Without fully considering the consequences, the Ninth Circuit has taken a standard of review designed to be applied by a reviewing court in addressing final agency actions and blindly applied it to situations where the district court is, in the first instance, reviewing the on-the-scene decisions of the Federal On Scene Commander ("FOSC") at an oil pollution response. By itself, this approach creates substantial constitutional problems, but, when coupled with the Ninth Circuit's directive that costs charged need not be "reasonable, prudent or necessary," the prejudice to the responsible party, and ultimately the Group, is insurmountable.

As a result, responsible parties are required to pay limitless monitoring costs, which include gross excess

and duplication, waste caused by outside political pressures and an unspecified but escalating component for base costs, representing indirect governmental overhead. The effect is to deprive Petitioners of due process, and at the same time produce an unwarranted subsidization of the United States government in one of the essential functions of the Coast Guard.

ARGUMENT

1. BY EMPLOYING THE ARBITRARY AND CAPRICIOUS STANDARD AT THE FIRST INSTANCE OF REVIEW WITHOUT CONCERN FOR REASONABLENESS, PRUDENCE, NECESSITY OR ANY SIMILAR FACTOR, THE NINTH CIRCUIT HAS ENCOURAGED OTHER COURTS TO ALLOW UNRESTRICTED SPENDING BY THE UNITED STATES GOVERNMENT.

In proclaiming that OPA 90 does not restrict the recovery of the United States to costs that were "prudent or necessary or reasonable," the Ninth Circuit has issued a directive to future courts that governmental waste or excess arising from the Coast Guard's monitoring efforts, whether caused by neglect, ignorance or any other factor short of that approaching actual bias or ill motive, is to be tolerated and, in effect, encouraged. When coupled with the fact that in cases involving oil pollution response there is no possible opportunity to obtain review of the government's actions prior to the district court's application of the arbitrary and capricious standard, Petitioners' constitutional rights to due process will continue to be

violated as unrestricted monitoring costs continue to mount.

The threshold problem arises as a result of the Ninth Circuit's adoption of the arbitrary and capricious standard of review from the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The APA, however, utilizes that standard in describing the standard of review to be applied by a reviewing court in addressing *final agency actions*. 5 U.S.C. §§ 107, 706; *United States v. Attati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990.) As Petitioners have emphasized, the actions of the FOSC at an oil pollution response are not "final agency actions." See *Conoco, Inc. v. United States*, 1994 WL 24249, *2 (E.D. La. 1994). To the contrary, the decisions of the FOSC are often necessarily "on the spot" decisions which, by their nature, cry out for subsequent meaningful review. Yet the Ninth Circuit has mandated that the judiciary need not be concerned with the reasonableness, prudence or even necessity of any item of cost, despite the absence of any prior meaningful review of the FOSC's decisions.

At least some attempt at a reconciliation of the judicial tension between the application of the arbitrary and capricious standard with the need for meaningful review appears in the district court's opinion in *United States v. Murphy Exploration and Production Co.*, 939 F.Supp. 489 (E.D. La. 1996). In *Murphy*, the United States sued to recover some $16,951.50 for helicopter overflights calculated on the basis of a charge of $3,767.00 per hour (roughly five hours of flight.) Murphy opposed the government's claim, emphasizing that it had performed a total of 48 helicopter overflights over a three day period by privately leasing a helicopter for a total cost of

$1,278.00 per day. Murphy also argued that the private helicopters were available for government use.

In agreeing with Murphy to limit the government's cost to $1,278.00 per day, the district court made two essential points. First, in paraphrasing Petitioners' due process argument, the court noted that " . . . to suggest that a cost is recoverable if the requisite causation exists simply because the FOSC authorized it in substance deprives a responsible party of any judicial review, and such a position would pose a serious due process problem." (939 F.Supp. at 493.)[5] Second, the court in *Murphy* recognized a need for some type of qualitative limit, which it described as "fairness and proportionality" in the analysis of what is arbitrary and capricious. (939 F.Supp. at 493.)[6]

The Ninth Circuit, however, has now restricted any such analysis. "Fairness and proportionality" have, in all likelihood, gone the way of reasonableness, prudence and necessity. In short, there is no basis upon which to limit the courts' future use of an inflexible standard of review, which, according to the Ninth Circuit is to be applied

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[5] Oddly, Judge Berrigan in the *Murphy* decision quotes from Judge Holland's Order on Motion for Partial Summary Judgment/Removal Costs in the case below. (App. 37.) That same sentiment seems to have been forgotten in the district court's final resolution of the case and ignored completely by the Ninth Circuit.

[6] Judicial concern for providing the United States government (in this case EPA under the companion CERCLA statute, 42 U.S.C. § 9607) a "blank check in response actions" was also raised by the Fifth Circuit in *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 906-908 (5th Cir. 1993).

without regard to the fairness, necessity or reasonableness of any cost.

2. THE BLANK CHECK PROVIDED TO THE COAST GUARD BY THE NINTH CIRCUIT MAKES POSSIBLE SUBSTANTIAL, IDENTIFIABLE ABUSES PERTAINING TO (A) EXCESSIVE AND UNNECESSARY MONITORING COSTS; (B) IMPROPER, INEFFICIENT AND POLITICALLY MOTIVATED DECISIONS; AND (C) CONTINUALLY UNSPECIFIED BUT MOUNTING BASE COSTS.

A. THE OPINION APPROVES THE RECOVERY OF UNCHECKED GOVERNMENTAL MONITORING COSTS, THEREBY SUBSTANTIALLY AND UNNECESSARILY INCREASING THE COST OF CLEANUP.

In discussing the subject of monitoring costs, it is important to focus upon the literal definition of that term. Inevitably, as in this case, the task of actual cleanup is performed by the responsible party, not by the Coast Guard. At issue is what amount of cost is to be allowed for purposes of supervision, overseeing or other related consultation,[7] and what party is to be charged for those activities.

Depending upon how the judgment below is characterized, monitoring costs relating to this incident

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[7] Admittedly, the Coast Guard may perform a vital function at the inception of an incident, but that concept is not principally at issue. The majority of Petitioners' objections below related to costs arising from subsequent monitoring efforts.

increased the total cost of this spill by roughly 29%.[8] In absolute terms, the Group was required to pay an additional $1,322,149 in monitoring costs, over and above its actual cleanup costs. Unfortunately, the charge for substantial monitoring costs incurred by the Coast Guard in the *Hyundai No. 12* incident has become all too commonplace.

Other spills demonstrate similar results. In the *North Cape* incident occurring on January 19, 1996 in Moonstone Beach, Rhode Island, the Group was required to pay the government slightly less than $3,400,000.00 in addition to actual cleanup costs in excess of $4,500,000.00. Costs paid to the government as monitoring costs totaled $4,000,000.00 in the *Tampa Bay* incident occurring on August 10, 1993, while government demands relating to the *Kuroshima*, an incident arising out of Summer Bay, Alaska on November 26, 1997, are expected to approximate $3,800,000.00. Governmental costs arising out of a February 4, 1999 incident in Coos Bay, Oregon involving the *New Carissa* will likely exceed all prior estimates.

Accordingly, the Group's interest and that of its mutually insured shipowner members in the Petition is not merely conceptual, as, by any standard, the payment of such significant monitoring costs represents a substantial additional expense. Even worse, much of the monitoring expense incurred will continue to be both duplicative

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[8] Excluding attorneys' fees, penalties and administrative fees, the district court awarded what it termed "removal costs" in the total sum of $1,109,963.00, plus interest in the amount of $212,186.75 over an assumed actual cleanup cost of $4,500,000.00.

and unnecessary, as the Ninth Circuit has foreclosed any meaningful challenge.

B. THE NINTH CIRCUIT HAS ENCOURAGED THE GOVERNMENT'S EXPENDITURE OF IMPROPER, INEFFICIENT AND EVEN POLITICALLY MOTIVATED COSTS WHICH DRASTICALLY INCREASE THE COST OF CLEANUP.

Much of the government's waste and inefficiency results simply from overkill. In the *Hyundai No. 12*, for instance, the Coast Guard brought four vessels to the scene, one of which served largely as a hotel (at a cost of $97,000.00). Petitioners were charged more than $132,000.00 for transportation of equipment which was unuseable (although Petitioners were not charged for the equipment.) Government supervisory or monitoring personnel far outnumbered the number of private individuals involved in actual cleanup.

Other examples are equally egregious. In the *New Carissa* incident, the Coast Guard required the use of an extremely expensive pumping system which ultimately pumped more than 135,000 gallons of fluid from the vessel. . . . of which some 250 gallons turned out to be oil. Sadly, the Ninth Circuit's approach offers no disincentives to such expenditures.

At other times, governmental agencies can be affected by political pressures. The tendency to require a procedure known as "high pressure hot water," (sometimes referred to colloquially as "steam cleaning") to an oil infested beach area has often been documented, even

though this procedure is far more expensive as well as substantially more hazardous to the environment. While a high volume moderate pressure or low pressure flush might well allow some level of algal residue to remain (and thus the life cycle to continue to regenerate), such a procedure does not appear as "clean" on the eleven o'clock news. Similarly, expensive skimming procedures are often employed, even when they have little chance of ultimate success, particularly in inclement weather, solely because of the image the Coast Guard hopes to create.

In other instances, the Coast Guard simply has too many agendas to fill. In many instances, functions other than "marine environmental response" are the real reason for the Coast Guard's appearance. In the *Hyundai No. 12* incident, for instance, the contemporaneous records of the *Sherman*, one of the four vessels which the Coast Guard sent to the scene, reveal that the mission listed for the vessel was either "Alaskan fishery patrol" or "search and rescue Alaska fishery patrol," but never "marine environmental response."

These "marine environmental responses" represent an opportunity for the Coast Guard to employ its personnel,[9] which, by itself, may not be inappropriate. Charging Petitioners or other responsible parties for that exercise, however, raises serious questions. Blindly passing those costs along without allowing Petitioners the opportunity to contest either the reasonableness or necessity of the charge not only raises grave constitutional concerns, but

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[9] Discovery in various spills reflects an extremely high number of Coast Guard personnel on "guard duty" being shuffled in and out of the scene.

also needlessly escalates the cost of oil pollution response.

C. THE NINTH CIRCUIT HAS DIRECTED THE RECOVERY OF UNSPECIFIED AND MOUNTING BASE COSTS WHICH BEAR NO DIRECT RELATION TO THE ACTUAL COST OF CLEANUP.

A substantial portion of the judgment below encompassed what have been referred to as "base costs." Base costs include costs which the Coast Guard would have incurred even in the absence of an oil spill, such as routine salaries and depreciation or capital costs which do not "result from" the incident. While the Petition demonstrates various rationales why these costs are not recoverable under OPA 90 (see Petition at 9, 14), the Group raises yet another significant practical concern.

In conducting its own informal study in an attempt to learn the impact of the unfettered award of base costs, the Group found that it was simply unable to quantify the amount of base costs charged from incident to incident. The Coast Guard decides upon the amount it will charge without providing any basis upon which the charge is calculated, thereby foreclosing any meaningful challenge by the party charged. The end result is that the responsible party has no idea precisely which salaries up the chain of command it is being asked to pay. By definition, each of these salaries would have been paid by the proper governmental agency in the absence of a marine environmental response.

To provide this Court with some form of quantitative analysis, Charles King, Petitioners' expert economist, testified at trial that the Coast Guard's costs which were actually incurred as a result of (i.e. but for) this incident were in the amount of $118,922.38. Yet the government was awarded more than $1,322,149, including interest, strictly for monitoring costs, a substantial portion of which represented base costs.

3. AS A RESULT, THE NINTH CIRCUIT HAS ARBITRARILY AND SUBSTANTIALLY INCREASED THE COST OF CLEANUP, THEREBY REQUIRING UNWARRANTED SUBSIDIZATION OF THE UNITED STATES GOVERNMENT.

The effect of the Ninth Circuit's opinion is to require Petitioners, and ultimately the shipowners, to subsidize the Coast Guard in the area of oil pollution response. Two principal problems result from this approach. First, an inordinately large amount of resources must be committed to oil pollution response, as overall costs skyrocket. Second, the shipowners are required to shoulder a disproportionate amount of that burden, as, despite the increase in waste and duplication, there is no judicial requirement that the Coast Guard act reasonably or prudently. The Ninth Circuit's approach now insulates the government's cost excesses from any meaningful review.

CONCLUSION

For these reasons, the Group respectfully urges this Court to grant the petition for writ of certiorari filed by Hyundai Merchant Marine Company, LTD, and Britannia Steam Ship Insurance Association Limited.

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Respectfully submitted,

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